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OPTION SALES.—II.

Among the unsatisfactory cases may be noted Bigelow v. Benedict.[1] Notwithstanding the seller had by the contract the entire option of delivering or not delivering the goods sold, and paid $250 for that option, still, in view of the fact that the purchaser was required to receive the goods at any time within six months, the court construed the transaction as a real one and not a wager, following Lord Coke's rule that "wheresoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken." "That there is an element of hazard in the contract is plain," said the court; but it failed to see upon the face of the contract that the parties intended a wager, and because the purchaser did not prove such an intention, the transaction was held valid. Kingsbury v. Kirwan[2] was a case in which, according to the report, plaintiffs sold for future delivery by the defendant, 1000 bales of cotton, the defendant to "keep his margins good," and the plaintiffs to "carry the contracts they should make for him only so long as he did so;" and because the defendant did not prove an intention not to deliver or to accept the cotton, the court, as in Bigelow v. Benedict, ruled in favor of the validity of the transaction. In Wolcott v. Heath,[3] Logan v. Musick,[4] and Corbett v. Underwood,[5] where the "commission merchant" recovered from his principal the amount of losses incurred in settling differences, the transaction was sustained because, as stated by the court in the last named case: "We perceive nothing to justify the inference that the corn would not have been delivered at the time required by the contracts;" yet no inquiry seems to have been made on the very important question whether the buyer was possessed of the necessary means to make the purchases he professed to make; and these cases are determined in view of the possible intention of the unknown third party to exact a compliance with the terms of the contract, though the case arose between the purchaser and the commission merchant only, and all that appeared in the way of cash advanced to make purchases were the sums deposited as "margins." In some jurisdictions, the agent so suing would have been required to lift his case above suspicion by showing that the other party principal was contracting for merchandise and not for margins. Rumsey v. Berry[6] involved a transaction similar to the one in Kingsbury v. Kirwan. The commission merchants in Chicago sold for Berry, a resident of Bangor, Maine, 10,000 bushels wheat for future delivery, contracting in their own name to deliver the same, but agreeing with Berry for "margins" only; and because he did not furnish sufficient "margins," the agents "cancelled the contract" with the ostensible purchasers, at a loss, to recover which loss the action was brought. This transaction, so much like carrying coals to Newcastle, was sustained. To the majority of the court it did "indeed appear a little singular and even suspicious that a man residing in Bangor, having no wheat of his own, should undertake to sell and deliver wheat in Chicago;" still, the majority could not "assume that any one has violated the law and been guilty of immoral and corrupting practices in his business transactions, without proof;" and they "utterly fail to discover any wrong on the part of the plaintiffs," because "their business was a legitimate one, and so far as appears, their connection with this transaction honest; their profits were not to be affected by the result, their commissions were not to be increased or diminished by any contingency." Though it was said to be "true they were aware that the defendant at the time had no wheat," yet, "the fact itself being immaterial, their knowledge of it is equally so." And so, by a majority of four judges against three, the lower court was sustained in its refusal to leave to a jury the question whether this was a wagering contract. This case goes farther than any others of those cited in illustrating the

1 70 N. Y. 202, 6 Cent. L. J. 324.
2 6 Cent. L. J. 228.
3 78 Ill. 433.
4 81 Id. 415.
5 83 Id. 324.
6 65 Me. 570.

proverb, "None so blind as those who will not see." Would not the same reasoning justify a court in allowing the keeper of a gaming house to recover from his patron a commission on the winnings at the game, if he had contracted in advance for the payment of such a commission as compensation for the use of the house and tables? Clearly in such a case the proprietors profits "were not to be affected by the result; their commissions were not to be increased or diminished by any contingency." So seemed to think two of the Maine judges, who demurred to the conclusions of the majority as "futile and evasive," and suggested that if any such contract were designed and understood to be a mere gambling transaction, the parties would be quite likely to have its terms simulate those of a real and honest bargain; and they declined to close their eyes to the real character of the transaction under examination. A third judge, less decided in his views, was "inclined to concur in this."

Conspicuously different from these are the views taken of such cases by other courts, which have not allowed the outward form of the transaction to disguise its real intention. *In re* Green,[7] was a case where the brokers sought to recover their losses by reason of insufficient margins, and the otherwise doubtful transaction was made exceedingly plain to Hopkins, J., by considering the circumstance that the bankrupt "was a country merchant of little or no means and with no money to invest in wheat, that is to pay for wheat," which the brokers well knew. "The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous," said the court. No suggestion that the brokers were innocent parties was for a moment entertained. "If the bankrupt had requested a party to pay the difference for him after the loss and such party had not been an actor, nor aided or assisted in the unlawful dealing out of which the loss grew, there would be some reason in allowing him to recover." Not so, however, when the party suing to recover his money had himself urged and induced, or participated in a plain wagering transaction.

To similar effect is the case of Marshall v. Thruston, decided by the Supreme Court of Tennessee while this article has been in preparation. To a suit by a bank upon notes given for money advanced by it, the defense was interposed that the defendant having been engaged in speculating in the future prices of Tennessee State bonds, the notes in suit were given for the differences due on settlement; and the question arose whether the bank's furnishing of the money to the defendant had any necessary connection with the speculative transactions in bonds. The court at the trial had instructed the jury that if defendant in his gaming transactions had sustained losses, "and the bank at his request paid the amount of such losses, or if the bank paid such losses without being requested, and defendant afterwards ratified its action, and gave his notes for the amount so paid, such amount can be recovered of him in this action;" but "if the bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover of him the amount so furnished." Both these instructions were sustained as unexceptionable by the appellate court. In response to the suggestion that mere knowledge on the part of the bank of the intended use of the money by defendant would make it an aider and abettor in the gambling, Cooper, J., explained that the test in such cases is whether the plaintiff requires any aid from the illegal transaction in order to establish his claim, or whether he was in fact a participant in the illegal transaction. And a recovery by the bank was allowed in that case, because no such participation appeared.

In Lyon v. Culbertson[8] the court looked to the fact that no wheat was offered or demanded, as showing that neither party expected the delivery of any wheat, and that both expected to settle on the basis of differences; and in Pickering v. Cease,[9] the fact that the grain "bought" was immediately "sold back" to the same party without being paid for, was conclusive on the question that it was a mere speculation in differences. In Brua's[10] Appeal, it was said: "That the transaction in this case assumed the form of a contract about a matter lawful in itself, was not conclusive as to

[7] 15 N. B. R. 198.

[8] 83 Ill. 33.
[9] 79 Id. 328.
[10] 55 Pa. St. 294.

its real motive, as the finding shows. That was the form which the South Sea Bubble took in England, the tulip speculation in Holland and the *morus multicaulis* in this country; and the form served only as a thin covering of one of the most frightful systems of gambling ever known." In Clark v. Foss,[11] Bunn, J., said: "The contracts sought to be set aside are written contracts, and the mortgage is under seal. Nevertheless the weight of authority, and I think of doctrine, is that you shall go behind the writing and show what the real intent and meaning of the parties were; and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face." In *ex parte* Young,[12] Blodgett, J., deduced from all the sounder authorities this as the proper test: "Did the parties intend to sell on one side and buy on the other the stocks which purported to be the subject matter of the transaction, or did they only intend to adjust the differences?"—adding that whenever "it was found that they meant only differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void."

These cases, with the accordant ones before cited, show the weight of authority to be in favor of the utmost astuteness on the part of the courts in investigating the real nature of all dealings in stocks or merchandise for future delivery. Names should be disregarded; masks should be fearlessly stripped off that the actual features of the transaction may be revealed. The courts that have failed to resort to this heroic treatment have not intended to sanction gambling transactions; they have on the contrary, as a rule, denounced them. But it seems, from the frequency with which gambling masquerades in the disguise of legitimate trade, that courts are in danger of being imposed upon; and when this is the case it is proper to require, not that the defendant assume the difficult task of proving an intent to gamble, but that the plaintiff carry the comparatively slight burden of showing that the transaction which may seem so nearly akin to a gaming device was in reality a genuine sale. Not only are the rules of law suspended when the reasons for such rules have ceased, but the courts are often required to establish rules, when adequate reasons therefor spring into being. It is necessary in these modern times that courts shall consider the forms which speculation assumes, and the disguises she puts on in imitation of legitimate trade, if they would avoid imposition and would see things as they are. It was said, on this point, in Clark v. Foss:[13] "The law does not undertake to prevent speculation. It does not undertake the Quixotic task of nicely governing men in all the relations of life, and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculating creatures as certainly as they are eating and sleeping ones. And although it is undoubtedly true that much harm comes to the community from over-speculation, it is more than donbtful if the world would be better off without speculators; or if it would be, that the law can do much in the way of abolishing them." But a plain distinction as to the view to be taken by the courts of this subject was recognized in Kirkpatrick v. Bonsall,[14] where it was said: "Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh, that is, speculate upon the probabilities of the coming market, and act upon this lookout into the future in their business transactions. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell, in a *bona fide* way. Such speculation can not be denounced. But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference; a margin as it is figuratively termed. Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while

11 10 C. L. N. 211.
12 6 Biss. 53.
13 10 C. L. N. 211.
14 72 Pa. St. 155.

the capital to complete an actual purchase or sale may be hundreds or thousands of millions. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfil; and thus the apparent business in the particular trade is inflated and unreal, and like a bubble only needs to be pricked to disappear, often carrying down the *bona fide* dealer in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market so as to produce the desired price. This, in the language of gambling speculation, is 'making a corner,' that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealing, and of the best interests of the community. These remarks perhaps contain nothing new, but they show how a contract, legal on its face, may become an instrument of illegal and ruinous schemes, injurious to the community and contrary to the highest policy of the State." And this language was recognized and adopted as most fully expressive of the duty of the courts in similar cases, by the Supreme Court of Michigan, in the well considered case of Gregory v. Wendell.[15]

The delusive character of these dealings in "futures" is made more apparent by considering the fact that all legitimate trade is based upon actual merchandise; while the nominal amount annually involved in "option contracts" in the United States is probably one hundred times in excess of the value of all the commodities actually on hand, of the classes which are the subjects of such transactions. Yet if the courts are careful to sustain all contracts which appear to be certain and valid on their face, because they do so appear, it results that there are legal contracts made in this country annually, to buy and sell one hundred times as many goods and stocks, and one hundred times as much coin, as there are in the country. Of course this is an absurdity. In mathematics it is understood that as soon as the element of "0" is introduced into calculations, all certainty as to results is at an end; for mathematics being the science of quantity, that which is not quantity, whenever it pretends to be quantity, produces mere delusion. So in trade, if an element be introduced which is not merchandise, but only pretends to be such, all basis of legitimate calculation or of legitimate profit at once disappears, and the supposed calculations of supposed profits are but the delusive bubble referred to by the Pennsylvania court. The legend of the two Yankee boys who, when shut up together, without even a jack-knife in their pockets, in a locked room for one hour, manifested their inherited talents and shrewdness by making a profit of ten dollars each at swapping jackets, was in former years understood to be a mere myth. It may be doubted whether the reality and legality of any "profits" so made will ever be sustained by any large majority of the courts. Yet it would be quite as reasonable to determine that an "option contract" is a real transaction, because it so appears upon its face, and that the ostensible profits made thereby are as actual as they pretend to be, without scrutinizing the transaction carefully, so as to determine whether the seller had on hand or could deliver the goods he pretended to sell, and whether the purchaser had on hand or could reasonably be expected to procure the money necessary to consummate the purchase; in other words, whether the speculation involved in the affair was a real mercantile transaction or merely a nominal and fictitious one.

[15] 8 Cent. L. J. 115.

STRANGER TO CONTRACT ENFORCING IT.

The law has undergone remarkable changes upon the rights of one who is a stranger to a contract, which contains a clause for his benefit, to enforce such a contract. At one time the preponderance of opinion was plainly in favor of the proposition that if one person made a promise to another for the benefit of a third, that third might maintain an action upon it. This, indeed, is the very language of Mr. Justice Buller, in Marchington v. Vernon, 1 B. & P. 101 (*in notis*). The same was the opinion of Eyre, C. J., as expressed in Company of Feltmakers v. Davis, 1 B. & P. 102. Such was also the early view in equity, as may be seen by referring to Hook v. Kinnear, 3 Swanst. 417 note, where the Lord Chancellor (1743), said: "It is certain if one person enters into an agreement with another for the benefit of a third per-

son, such third person may come into a court of equity and compel a specific performance."

Subsequently, however, this doctrine was contravened at law by the case of Tweddle v. Atkinson, 1 B. & S. 393, where the court disregarded the earlier authorities (those, however, which we have noted do not appear to have been cited,) and held that a third person can not sue at law on a contract made by others for his benefit, even if the contracting parties have agreed that he may, and they laid it down also, (departing from the doctrine of Dutton v. Poole, 2 Lev. 210), that near relationship makes no difference. And a similar position in equity appears to be laid down by Lord Langdale, in Colyear v. Lady Mulgrave, 2 Keen, 98, in which he remarked substantially as follows: "That if there is a covenant by one person with another to pay a sum of money to a stranger, or do any act for the benefit of a stranger, who is not a party to the instrument or agreement, the person to whom the money is to be paid, or who is to be benefited cannot sue, either at law or in equity, because there is no privity of contract."

But one finds in the still later decisions, a strong disposition to revert to the earlier rule, and to give a right of redress to the stranger so circumstanced. The more modern cases in effect adopt the position which was laid down by Lord Alvanley, (a judge who distinguished himself both in equity and on the common law bench), in Pigott v. Thompson, 3 B. & P. 149 (1802). He there said: "It is not necessary to discuss whether if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C." The same view is taken by Sir William Grant, in Gregory v. Williams, 3 Mer. 582, a case which is at the basis of the admirable judgment of Strong, V. C., in Mulholland v. Merriam, 19 Grant, 288. In that case the defendant had agreed with a person deceased, that upon an assignment of real and personal estate to him by the deceased, he would pay thereout certain sums to the children of the deceased. It was contended that the beneficiaries had no right to seek to recover the amounts by a suit in their own names, but that the only remedy was by an action at law in the name of the personal representative of the father with whom the agreement had been made. The Vice-Chancellor, however, argued thus: That if a personal representative of the deceased did sue at law and recover the money from the defendant, he would recover as trustee for the beneficiaries. If the money when recovered would be affected with a trust, so would in like manner the right of action which vested in the personal representative be impressed with a like trust, and if so, then the personal representative and the beneficiary might conjointly maintain the bill. For this he cites Gregory v. Williams. Another and later decision might also have been referred to, and to the same effect, namely, that of Vice-Chancellor James, in Peel v. Peel, 17 W. R. 586. In Mulholland v. Merriam, there was no personal representative of the deceased, and as such a representative would have been merely a formal party, the vice-chancellor directed that the suit might proceed in the absence of any person representing the estate of the deceased under the authority of the general orders. This decision was affirmed on re-hearing by the full court in s. c., 20 Gr. 152. The views of the present chancellor upon this important question may be found in Shaw v. Shaw, 17 Gr. 282. He there held that when land was conveyed in consideration of the grantee's agreeing to convey a part to a third person who was a stranger to the transaction, this third person could maintain a suit in his own name for the recovery of the part in question. In this case, both the contracting parties were made defendants, and the beneficiary was the plaintiff. The chancellor, at p. 285, pointedly adverts to this, and says that in his opinion the suit was properly constituted.

The conclusions reached in these Canadian decisions are also fortified by very recent English authorities. Thus in Touche v. Metropolitan Railway Warehousing Company, L. R., 6 Ch. 777, Lord Hatherley states that there is authority for holding that where a sum is payable by A. B., for the benefit of C. D., then C. D. can claim under the contract, as if it had been made with himself. See also Gale v. Gale, L. R. 6 Ch. D. 144.

In the Irish courts reference to the following cases will be found useful on this head of the law. In Joyce v. Halton, 11 Ir. Ch. R. 123, the Master of the Rolls in Ireland decided against the right of third persons collateral to the contract to sue. This was reversed on appeal in s. c., 12 Ir. Ch. R. 71, the lord justice giving very much the same reasons as Vice-Chancellor Strong. See also Cowlray v. Thompson, Ir. 2 Ch. 226, where the authority of Tweddle v. Atkinson was recognized and followed; Brennan v. Brennan, Ir. R. 2 Eq. 270, where the right of the third parties to intervene was given effect to chiefly on the ground that the agreement was in the nature of a family arrangement, and for the benefit of the relatives who brought the suit.

RESCISSION OF CONTRACT MADE BY FRAUDULENT REPRESENTATIONS—ACTION.

KELLOGG v. TURPIE.

Supreme Court of Illinois.

[Filed at Ottawa, January, 1880.]

Where a vendor rescinds a contract of sale of goods made upon credit and obtained by fraudulent representations of the vendee, he can not bring assumpsit to recover what the goods were reasonably worth, but is restricted to an action in tort, of trover or replevin.

SHELDON J. delivered the opinion of the court:

This was an action of assumpsit to recover the value of certain bills of goods purchased by the defendant of the plaintiff on the 20th day of December 1875, and in January and February 1876, on a credit of four months. The suit was commenced March 1, 1876.

The declaration contains a special count, setting forth in substance the sale of the goods to the defendant upon a credit of four months through and on account of false and fraudulent representations made by the defendant as to his pecuniary responsibility for the price of $1,124.35 and that that was the value of the goods; that plaintiffs first learned of the false and fraudulent character of the representations on the last day of February, 1876, and that immediately thereupon they rescinded the contract of sale so made as aforesaid on credit and demanded payment immediately of the value of the goods at the time of the purchase, which defendant refused to make.

The circuit court sustained a demurrer to the declaration and gave judgment for the defendant. On appeal to the appellate court for the second district, the judgment was affirmed and an appeal taken to this court.

The declaration clearly enough presents a case of fraud entitling the plaintiffs to rescind the contract of sale made on a credit, and the question which is presented is, whether upon making such rescission of the contract, the plaintiffs may bring this action of assumpsit to recover what the goods were reasonably worth, or are restricted to an action in tort, of trover or replevin.

When such a fraudulent contract is rescinded by the vendor, as it may be, the contract is treated as a nullity and the defendant considered not as a purchaser of the goods, but as a person who had tortiously got possession of them, and the form of action in such case is in trover or replevin for the tort. But this action of assumpsit proceeds upon the ground of a contract made between the parties and existing at the time of action brought, that the goods were rightly obtained by purchase. Now the only contract appearing by the declaration, between the parties is an express contract for the sale of the goods upon credit. The time of credit had not expired when the suit was commenced and it was prematurely brought on the contract which was actually made. Where there is an express contract the law will not imply one. It is not admissible to say there was a different implied contract, when there was an express one.

Nor can the contract be rescinded in part and affirmed as to the residue. The plaintiffs if they treat the transaction as a contract at all, must take the contract altogether and be bound by its specified terms. By bringing this action plaintiffs affirm the contract made between them and the defendant. This we believe to be the doctrine upon the subject as resting upon principle and established by the weight of authority.

"In such cases," says Chitty, in his work on Contracts, vol. 1, pp. 569–570, "the vendor must either affirm or disaffirm the contract as a whole. And, therefore, when goods are fraudulently procured to be sold on credit, the vendor can not sue for the price before the credit has expired, but he must sue in *tort* for the value of the goods, for by declaring for this price he affirms the contract. and when there is an express contract the law will not imply any other."

To the same effect is Story on Sales, § 446, that "where goods have been obtained through fraud or misrepresentation of the vendee, the vendor may either affirm the sale or rescind it and reclaim the goods. If he elect to rescind he must, as we have seen, do so within a reasonable time, and must take care to do nothing affirmatory of the contract or his right to rescind will be lost. And in such case he should sue in trover or replevin for the goods treating the whole contract as utterly nullified by the fraud, and he should be careful not to bring assumpsit, since as the foundation of this action is the promise of the vendee, the contract is thereby directly affirmed and his rights will depend upon the contract solely." In full support of the text of these writers and the views we have expressed are Read v. Hutchinson, 3 Camp. 351; Ferguson v. Carrington, 9 B & Cr. 59, 17 E. C. L. 330; Strutt v. Smith, 1 C. M. & R. 311; Selway v. Fogg, 5 M. & W. 83.

In Allen v. Ford, 19 Pick. 217, the same doctrine is declared when the court say: "If the plaintiff rescinds the contract as he would have a right to do, the defendant failing to perform the condition of sale, his proper remedy for a conversion of the property is an action of trover. And he can not waive the tort and recover the value of the goods in an action of assumpsit. In such a form of action the contract is admitted to exist at the time of the action brought, and when there is an express contract the law will not imply one." To like effect are Dellone v. Hull, 47 Md. 112; Whitlock v. Heard, 3 Rich. 88.

The decisions in New York appear to be in favor of the maintenance of such an action as the present.

In Roth v. Palmer, 27 Barb. 652, the court speaking upon the subject of the election which the vendor has, in the case of a fraudulent purchase of goods, to sue in assumpsit rather than tort, say: "Originaliy, and particularly in the English courts and in Massachusetts, a distinction was attempted to be established as to the cases in which the plaintiff should be allowed his election and to confine it to cases where the fraudulent purchaser had parted with the goods and received money on his sale of the same, which the courts allowed the plaintiffs to treat as money had and received to the plaintiff's use. Bennett v. Frances, 2 Bos. & Pul. 550, 555; Jones v. Hoar, 5 Pick. 285. But the cases in our own courts recognize no such distinction. They seem to allow it to be done in all cases where the plaintiff would have been allowed to pursue his remedy in tort, and the decisions in this court have been too numerous and too uniform to allow us now to set up any distinction or limitation even if it were desirable on principle."

But there is no course of decisions in this State which requires of us any departure from principle

and the prevailing authority upon this subject. This court has recognized the distinction above, which the New York courts would seem not to do, and has held that where goods have been obtained tortiously, in order that assumpsit can be maintained, it is essential that the wrong doer should have sold the goods or in some way converted them into money or money's worth. Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Id. 316. In Wigand v. Sichel, 3 Keyes, 120, the court, although sustaining the action of assumpsit in a cause like the present, do so upon a different ground from that in Ruth v. Palmer. "It is not accurate," say the court in the former case, "to say that the plaintiffs sought to avoid the contract of sale. It is the credit only that is sought to be avoided. It was a sale of goods which the plaintiffs by their action affirmed. It was, however, a sale where the credit was obtained by fraud, and in law amounted to a sale for cash. In stating it in their complaint, therefore, to be a sale and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale. They endeavored merely by proof of the act of fraud to reduce the transaction to a cash sale."

We have held that where a party rescinded a contract on the ground of fraud, such rescission must be total; a portion of the contract can not be affirmed and a portion repudiated. Bowen v. Schuler, 41 Ill. 193; Ryan v. Brant, 42 Id. 78; King v. Mason, 42 Id. 223.

We adopt with approval the following language of Pillsbury, J., who delivered the opinion of the appellate court in the case at bar, in comment on this case of Wigand v. Sichel: "The goods were procured by a contract, though fraudulent, one of the constituent parts of which was that time should be given for the payment thereof; with reference to this credit, the amount to be paid for the goods was determined; and we are unable to see how the credit was obtained by fraud, distinct from the other terms of sale, or how the credit can be avoided, the sale be affirmed, with a different time of payment fixed without the consent of the purchaser. If in such case the credit is the only part of the contract resting upon the fraud, and that can be severed from the other terms of sale, then it necessarily follows that the credit is the only portion of the contract that can be repudiated, leaving the contract of sale in full force in other respects, or as the New York court expresses it, 'it becomes a sale for cash.' If, then, the legal effect of the contract after such disaffirmance is a sale for cash, the vendee is in no sense a wrongdoer, and the defrauded vendor can not thus treat him and revest himself with the title to the goods, which we believe is not considered good law anywhere."

We regard the New York decisions upon the subject as variant from the current of authority and the principles upon which they are rested do not commend themselves to our approval.

The difficulty in the way of this suit is not avoided by saying as appellant's counsel does, that the action is not brought for the agreed price of the goods, but for the price the goods were reasonably worth and, therefore, the special contract which was made is not affirmed because not sued upon, but that the suit is upon an implied contract to pay what the goods were reasonably worth. The rule as stated in some of the authorities cited is, that when there is an express contract the law will not imply one.

As said by Parke B., in Strutt v. Smith, *supra:* "It is clear that the plaintiffs cannot avail themselves of the defendant's frauds so as to rescind the contract and substitute a new contract of sale on different terms. * * * * They might possibly on the evidence have maintained trover, on the ground that the fraud vitiated the contract, but if they treat the transaction as a contract at all, they must take the contract altogether and be bound by the specified terms." The earlier case of De Symons v. Minchwich, 1 Esp. 430, cited as in favor of this action, is overruled by the late English decisions.

Other cases cited by appellant's counsel are where goods obtained under a fraudulent contract had been disposed of and it was held that assumpsit would lie for the money received, or where money had been received upon such a contract and upon its rescission assumpsit for money had and received was held substantially; or where some security as a bill or note, payable at a future day had been taken in payment for goods which had been sold and turned out to be worthless and an action was held to lie immediately for the price of the goods sold, on the ground that there had been no payment made for them.

There is a plain distinction between all such cases and the one now before us. The judgment of the appellate court will be affirmed.

Judgment affirmed.

CONSTITUTIONAL LAW — TAXATION OF NATIONAL BANK SHARES.

PEOPLE v. WEAVER.

Supreme Court of the United States, October Term, 1879.

1. The provision of the National bank law that State taxation on the shares of the banks shall not be at a greater rate than is assessed on other money capital in the hands of citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the ratio of percentage charged on such valuation.

2. A statute of a State, therefore, which establishes a mode of assessment by which the shares of a National bank are valued higher in proportion to their real value than other moneyed capital, is in conflict with the act of Congress, though no greater percentage is levied on that valuation than on the valuation of other moneyed capital.

3. The statute of New York of 1866, which permits a debtor to deduct the amount of his debts from the valuation of all his personal property, including moneyed capital, except his bank shares, taxes those shares at a greater rate than other moneyed capital, and is, therefore, void as to the shares of National banks.

In error to the Court of Appeals of the State of New York.

Mr. Justice MILLER delivered the opinion of the court.

The law of the State of New York for taxation in the county of Albany, enacted in the year 1850, contained the following section:

"Sec. 9. If any person shall at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In the year 1866 the legislature of that State enacted on this subject another law, the first section of which reads as follows:

"Sec. 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

The defendants in error constituted the board of assessors of the city of Albany for the year 1875, and assessed against the plaintiff for taxation the sum of $38,250 on account of shares owned by him in the National Albany Exchange Bank, organized under the general banking act of Congress. He appeared before this board in due time and demanded the reduction of this sum to the amount of one dollar, and accompanied the demand with this affidavit:

"City and County of Albany, *ss:*

"I, Chauncey P. Williams, being duly sworn, do depose and say that the value of personal estate owned by me, including my bank stock, after deducting my just debts and my property invested in the stock of corporations or associations liable to be taxed therefor, and my investments in the obligations of the United States, does not exceed the sum of one dollar.

"C. P. WILLIAMS.

Subscribed and sworn before me, this 28th day of September, 1875.

JAMES MAHER, Notary Public."

The defendants refused to make this deduction, and under the procedure in the courts of New York, which allows of an amicable suit on an agreed statement of facts, the case finally came to the Court of Appeals of that State. The judgment there being in favor of defendants, the plaintiff brings the record to this court by writ of error. Three questions were raised and decided in the Supreme Court and its judgment affirmed in the Court of Appeals. They are thus stated in the record.

"The case coming on for argument on the submission thereof, after hearing Mr. Hale, of counsel for relator, and Mr. Peckham, of counsel for defendants, the court decides:

"1st. That it was not the duty of the defendants, as assessors of the city of Albany, to comply with the demand made by said relator, and reduce his assessments to the sum of one dollar, and answer the first question submitted in the negative.

"2d. That under the law of the State of New York, referred to in the second question, and passed April 23, 1866, the defendants, as such assessors, were justified in refusing to reduce the relator's assessment on his shares of bank stock mentioned in said submission to the sum of one dollar, and answers the second question in the affirmative.

"3d. That the said law of the State of New York, passed April 23, 1866, is not in violation of any law of the United States relating to the amount of taxes on shares of National banking associations, and answers the third question submitted in the negative.

"Judgment is, therefore, ordered for the defendants against the relator, with costs."

Of the second of these propositions this court has no jurisdiction, but must accept the decision of the highest court of the State that the act of 1866 took the money invested in bank shares out of the general provision of the law of 1850, which allowed a deduction of the debts owing by the shareholder from the value of the personal property, as a basis for laying the tax. In that respect we are bound by the decision of the Court of Appeals as the true construction of the State statute. The first proposition is but the necessary result of the case, if the other two are decided in favor of defendants by that court. We have thus left for our consideration the third proposition, which being decided against a right asserted by plaintiff under the act of Congress establishing the National banking system, presents a question reviewable by this court. We proceed to consider it.

The Court of Appeals delivered no formal opinion in the present case, but in the entry of their

judgment, which is part of the record, they say: "This judgment is upon the authority of the former decision of this court rendered in the case of People v. Dolan and others. 36 N. Y. 59."

The opinion in that case is before us, and it decides directly the question now presented, and if sound it justifies the judgment of the court in this case. We have given it the careful consideration which the high character of the court demands at our hands. The question arises on the provision of the National bank law concerning taxation of the shares of the banks, which is thus expressed in Sec. 5,219 of the Revised Statutes, in force at the time of this assessment:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located, * * * * subject only to the two restrictions, that taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the State court, that the effect of the State law is to permit a citizen of New York who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor can it be denied that inasmuch as nearly all the banks in that State and in all others are National banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the National bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is whether Congress, in passing the act which subjected these shares to taxation by the State, intended by the very clause which was designed to prevent discrimination between National bank shares and other moneyed capital, to authorize such a result.

That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares is abundantly established by the cases of McCulloch v. State of Maryland, 4 Wheat. 316; Weston v. City of Charleston, 2 Pet. 449; Osborne v. United States Bank, 9 Pet. 738.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the States to tax these shares it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said, you may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may by a narrow interpretation of the act of Congress and by skilfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State government to fall with unequal weight on the subject of taxation thus surrendered to it by the National government.

The argument by which this view is supported is founded on the assumption that while Congress limited the State authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of State regulation. The State can, therefore, adopt any arbitrary or conventional system of valuation as a basis of taxation, however unequally or unjustly it may operate and however it may discriminate against bank shares, provided the percentage of the tax levied in this valuation is the same in all cases. If, for instance, the tax is two per cent. on all personal property, the argument is that the act act of Congress is not violated if the valuation on the money of the citizen invested in State bonds is, by statute, one half its real value, and that on bank shares is its full value, or as in the statute of the State now under consideration, the tax-payer is allowed an exemption from taxation in whole or in part, as regards his State bonds, while none is allowed in reference to bank shares.

"Taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Seizing upon the word rate in the sentence as if disconnected from the word assessment and construing it to mean percentage on any valuation that might be made, the Court of Appeals arrive at the conclusion that, since that percentage is the same in all cases, the act of Congress is not infringed. If this philological criticism were perfectly just we still think the mani-

fest purpose of Congress in passing this law should prevail. We have already shown what that was. But the criticism is not sound. The section to be construed begins by declaring that these shares may be "included in the valuation of the personal property of the owner in assessing taxes imposed by authority of the State within which the association is located." This valuation then is part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is taxation. In what respect shall it be not greater than the rate assessed upon other capital? We see that Congress had in its mind an assessment, a rate of assessment and a valuation, and taking all these together the taxation on these shares was not to be greater than on other moneyed capital.

"When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed an assessment consist in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation can not be apportioned without it." Cooley on Taxation, 258–9; Burroughs on Taxation, p. 198, sec. 94. So also Judge Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax. Determining the share of a tax to be paid by each individual. Levying a tax. 1 Bouv. 154. These definitions show that in the best use of the language employed by Congress we are justified in looking to the rule of valuation adopted by the State in assessing taxes on these shares, as well as to the uniformity of percentage to ascertain whether the congressional restriction has been violated.

It is said, however, that the judgment of the State court is supported by the decision of this court in the case of People v. Commissioners, 4 Wall. 244. The specific question now before us was not involved in that case. The only matter before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative, and it is all that was decided or could be decided. The sentence in Judge Nelson's opinion on which the argument is founded, reads thus:

"The answer is that upon a true construction of this clause of the act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

"If we give to the phrase "rate of taxation" in this sentence no more than its proper force, and if we observe that the learned judge speaks of the proportion or percentage *in* the valuation, not *on* it, as it is misquoted, we have the idea which we have already supposed to be the true one in the minds of the law makers. However this may be, we feel quite sure that the question of limiting the effect of the act of Congress to a discrimination in the percentage levied as a tax, without regard to equality in the valuation on which that tax was levied, was not before the court, and was not intended to be decided. And in our view such a proposition is untenable.

We are, therefore, of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of National bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress, and the judgment of that court is reversed and the case remanded for further proceedings in conformity to this opinion.

NOTE.—At the same time the following opinions were also delivered by Mr. Justice MILLER, on appeal from the Circuit Court of the United States for the Northern District of Ohio. We have space only for the *syllabi*.

PELTON V. COMMERCIAL NATIONAL BANK.

1. Although the statutes of a State provide for the valuation of all moneyed capital for purposes of taxation at its true cash value, including shares of the National banks, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while national bank shares are assessed at their full value, is a violation of the act of Congress which prescribes the rule by which those shares shall be taxed by State authority.

2. In such case, on payment or tender of the sum which the bank shares ought to pay under the rule established by the act of Congress, a court of equity will enjoin the State authorities from collecting the remainder.

CUMMINGS V. MERCHANTS NATIONAL BANK.

The Constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all the real and personal property, according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to

all other personal property and moneyed capital ceases with the county boards.

Throughout a large part of the State of Ohio, including Lucas county, in which the plaintiff bank is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at six-tenths its true value. The State board of equalization of bank shares increased the valuation of these shares to their full value. The court holds:

1. That the act creating the board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing all property at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a law can not be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration.

2. The rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessments is in conflict with the Constitution of Ohio, and works manifest injustice to the owners of bank shares.

3. When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power.

4. The appropriate mode of relief in such cases is upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess.

REMOVAL OF CRIMINAL CAUSES INTO FEDERAL COURTS.

STATE v. DAVIS.

Supreme Court of the United States, October Term, 1879.

1. Section 643 of the Revised Statutes of the United States which declares that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by, authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court," etc., is not in conflict with the Federal Constitution.

2. D was indicted for murder in a State court of Tennessee. In his petition, duly verified, for removal of the prosecution to the Federal court, he stated that although indicted for murder no murder was committed; that the killing was done in the petitioner's own necessary self-defense to save his own life; that at the time when the alleged act for which he was indicted was committed he was and is an officer of the United States, to wit, a deputy collector of internal revenue; that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States as deputy collector as aforesaid he was assaulted and fired upon by a number of armed men, and that in defense of his own life he returned the fire, which is the killing mentioned in the indictment: *Held*, that the petition was in conformity with the statute, and upon being filed the prosecution was properly removed to the Circuit Court of the United States for that district.

On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Middle District of Tennessee.

Mr Justice STRONG delivered the opinion of the court:

The defendant in this case was indicted for murder in the Circuit Court for Grundy County in the State of Tennessee, and on the 29th day of August, 1878, before the trial of the indictment, he presented his petition to the Circuit Court of the United States for the proper district, praying for a removal of the case into that court, and praying for a *certiorari*, etc. The record having been returned, in compliance with the writ, a motion was made to remand the case to the State court, and on the hearing of the motion, the judges were divided in opinion upon the following questions:

First. Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under section 643 of the Revised Statutes.

Second. Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress.

And third. Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

The difference of opinion has been certified to us, together with a transcript of the record and proceedings in the cause.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an act of Congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the act of Congress admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defense, to save his own life; that at the time when the alleged act for which he was indicted was committed, he was, and still is, an officer of the United States, to wit, a deputy collector of

internal revenue, and that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire. The petition was verified by oath, and the certificate required by the act of Congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if section 643 of the Revised Statutes embraces criminal prosecutions in a State court, and makes them removable, and if that act of Congress was not unauthorized by the Constitution. The language of the statute (so far as it is necessary at present to refer to it), is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," the case may be removed into the Federal court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done or claimed to have been done, in the discharge of his duty as a federal officer. It makes such a claim a basis for the assumption of federal jurisdiction of the case, and for retaining it, at least, until the claim proves unfounded.

That the act of Congress does provide for the removal of criminal prosecutions for offenses against the State laws when there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any act of Congress, and that it is an offense against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in State tribunals. And it is argued that the act of Congress can not mean what it says, but that it must intend only such prosecutions in State courts as are for offenses against the United States—offenses against the revenue laws. But there can be no criminal prosecution initiated in any State court for that which is merely an offense against the general government. If, therefore, the statute is to be allowed any meaning when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws in which defenses are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether section 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in Martin v. Hunter, 1 Wheat. 363, "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the State court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if after trial and final judgment in the State court the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon

the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the 8th section of the 1st article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the 2d section of the 3d article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc. This provision embraces alike civil and criminal cases arising under the Constitution and laws. Cohens v. Virginia, 6 Wheat. 399. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; 6 Wheat. 379. It was said in Osborn v. United States Bank, 9 Wheat. 823, "when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States when it arises out of the implication of the law. Chief Justice Marshall said in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control." * * * "The collectors of the revenue, the carriers of the mail, the mint establishment and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The judiciary act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution, and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, section 1,745, or an indirect mode of exercising original jurisdiction, as intimated in Railway Company v. Whiton, 13 Wall. 237, we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But, if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the National government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential also to an uniform and consistent administration of National laws. It is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what

protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States the National government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in State courts, cases under the Constitution and laws of the United States might have been expected to arise, as in fact, they do. Indeed, the powers of the general government and the lawfulness of authority exercised or claimed under it are quite as frequently in question in criminal cases in State courts as they are in civil cases, in proportion to their number.

The argument so much pressed upon us that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defense presents a case arising out of an act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the National government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested, it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States and the judicial determination of questions arising under them are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

It is true the act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from State courts into the Circuit Courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an act was passed (3 Stats. at Large, 198) providing that if any suit or prosecution should be commenced in any State court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the act or under color thereof, it might be removed before trial into the Circuit Court of the United States, provided the act should not apply to any offenses involving corporal punishment. This act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the act of March 3, 1815, (3 Stat., p. 233, sec. 6,) and re-enacted in 1817 for a period of four years.

So, in 1833, by the act of March 2d, (4 Stats., ch. 57, sec. 3,) it was enacted that in any case where suit or prosecution should be commenced in a State court of any State against any ofofficer the United States, or other person, for or on account of any act done under the revenue laws of the United States, or undercolor thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the Federal circuit court of the proper district. The history of this act is well known. It was passed in codsequence of an attempt by one of the States of the Union to make penal the collection by United States officers within the State of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the Senate by a vote of thirty-two to one, and in the House by a majority of ninety-two. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the judiciary committee, which introduced the bill, said:

"It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. Whether in criminal or civil cases it gives this right of removal. Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. * * * It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever, for a State would have nothing more to do than to declare an act a felony or misdemeanor to nullify all the laws of the Union."

The provisions of the act of July 13, 1866, 14 Stats. 171, sec. 67, relative to the removal of suits

or prosecutions in State courts against internal revenue officers, provisions re-enacted in section 643 of the Revised Statutes, are almost identical with those of the act of 1833, the only noticeable difference being that in the latter act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word prosecution is a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the Constitution has been that it authorizes the removal from State courts to the Circuit Courts of the United States alike civil and criminal cases, arising under the laws, the Constitution or treaties.

The subject has more than once been before this court and it has been fully considered. In Martin v. Hunter, 1 Wheat. 335, it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that Congress might authorize a removal either before or after judgment; that the time, the process and the manner must be subject to its absolute legislative control. In that case also it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the Constitution if it could act only upon the parties and not upon the State courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would, in many cases, be rights without corresponding remedies." * * * "In respect to criminal prosecutions there would at once be an end of all control, and the State decisions would be paramount to the Constitution." The expression that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable has been laid hold of here in argument, as a declaration of the court that criminal prosecutions can not be removed. It is a very short-sighted and unwarranted inference. What the court said was that the remedy in such cases seems to be insurmountable if it could not act upon State courts as well as parties, and it was ruled that it does thus act. The expression must be read in its connection. In Martin v. Hunter, the removal was by writ of error after final judgment in the State court, which certainly seems more an invasion of State jurisdiction than a removal before trial. The case was followed by Cohens v. Virginia, 6 Wheat. 264, a criminal case in which the defendant set up against a criminal prosecution an authority under an act of Congress. There it was decided that cases might be removed in which a State was a party. This also was a writ of error after a final judgment; but it, as well as the former case, recognized the right of Congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In Mayor v. Cooper, 6 Wall, 247, the validity of the removal acts of 1863, March 3d, sec. 5 of chap 81 (12 Stat., 756,) and its amendment of May 11, 1866, (14 Stat., 1866,) which embraced not only civil cases, but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: The constitutional power is given in general terms. No limitation is imposed. The broadest language is used. All cases so arising are embraced. How jurisdiction shall be acquired by the inferior Court" (of the United States,) "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired is not prescribed. The Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature. Jurisdiction original, or appellate, alike comprehensive in either case may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States, as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such an ingredient in the mass, it is sufficient." The court added, "We entertain no doubt of the constitutionality of the jurisdiction given by the act under which this case has arisen." See also Com. v. Ashmun, 3 Grant's Cases, 436; Id., 416–418; State v. Hoskins, 77 N. C., 530, decided in 1877, where the constitutionality of section 643 of the Revised Statutes was affirmed after a full and instructive discussion.

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offenses against State laws from State courts to the Circuit Courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to and others set out with great force the indispensibility of such a power to the enforcement of Federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is: "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when

removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The Circuit Courts of the United States have all the appliances which are needed for trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases, and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the general government grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

Question first, answered in the affirmative.

Question second, answered as in the opinion.

Question third, answered in the affirmative.

Mr. Justice CLIFFORD and Mr. Justice FIELD dissent.

NOTE.—See State v. O'Grady, 5 Cent. L. J. 565,

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

CONSTITUTIONALITY OF THE FEDERAL ELECTION LAWS—HABEAS CORPUS.—1. The appellate jurisdiction of this court, exercisable by *habeas corpus*, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not. 2. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends generally to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act. 3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error. 4. Where personal liberty is concerned the judgment of an inferior court affecting it is not conclusive but the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ. 5. Certain judges of election in the City of Baltimore, appointed under State laws, were convicted in the Circuit Court of the United States, under secs. 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under secs. 2016, 2017, 2021, 2022, title XXVI. of the Revised Statutes: *Held*, that the question of the constitutionality of said laws is good ground for this court to issue a writ of *habeas corpus* to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional the prisoner should be discharged. 6. Congress had power by the Constitution to pass the sections referred to, viz., sec. 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, etc.; and section 5522, which makes it a penal offense for an officer or other person with or without process to obstruct, hinder, bribe or interfere with a supervisor of an election, or marshal or deputy marshal in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; also secs. 2011, 2012, 2016, 2017, 2021, 2022, title XXVI. of the Revised Statutes, which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals; these being the laws provided by Congress in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of representatives and for preventing frauds therein. 7. The circuit courts have jurisdiction of indictments under these laws, and a conviction and sentence in pursuance thereof is lawful cause of imprisonment, from which this court has no power to relieve on *habeas corpus*. 8. In making regulations for the election of representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "the times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators," Congress has a supervisory power over the subject, and may either make new regulations or add to, alter or modify the regulations made by the State. 9. In the exercise of such supervisory power Congress may impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted. 10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter." 11. There is nothing in the relation of the State and National sovereignties to preclude the co-operation of both in the matter of election of representatives. If

both were equal in authority over the subject, collisions of jurisdictions might ensue; but the authority of the National government being paramount, collisions can only occur from unfounded jealousy of such authority. 12. Congress has power by the Constitution to vest in the circuit courts the appointment of supervisors of elections. It is expressly declared that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is nevertheless left to the discretion of Congress. 13. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The National government has the right to use physical force in any part of the United States to compel obedience to its laws and to carry into execution the powers conferred upon it by the Constitution. 14. The concurrent jurisdiction of the National government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection or forts, magazines, arsenals, etc. 15. The provisions adopted for compelling the State officers of election to observe the State laws regulating elections of representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offense against the United States which Congress may rightfully inhibit and punish. This necessarily follows from the direct interest which the National government has in the due election of its representatives and from the powers which the Constitution gives to Congress over this particular subject.—*Ex parte Siebold.* Petition for *habeas corpus* and for *certioarari* to the United States Circuit Court for the District of Maryland. Opinion by Mr. Justice BRADLEY. Mr. Justice FIELD and Mr. Justice CLIFFORD dissenting. Application denied.

SUPREME COURT OF INDIANA.

February, 1880.

RAILROADS— APPROPRIATION OF LANDS—TRESPASS.—In a proceeding to appropriate lands for a railroad, appellant offered in evidence the record of an action in trespass, brought by the owners of the land against appellants, wherein they had recovered judgment against appellant for injuries done to the property by entering upon it and constructing its railroad without having first legally appropriated the land. The court refused to admit the evidence. BIDDLE, J., said: "Appellant claims that appellees can not recover damages in an action of trespass for the injury done in establishing the railroad upon their premises without authority and afterwards recover damages for the same injury, when the appellant seeks to appropriate the land legally. This argument is unsound. If the damages in this case could have been assessed according to the condition of the property as it would have been without the railroad upon it, there would be some plausibility in the argument, but as this could not be done the argument can not be regarded as expressing a sound legal principle." Judgment affirmed.—*L. M. & B. R. Co. v. Murdock.*

REPLEVIN — DEFECTIVE VERDICT —VENIRE DE NOVO.—In an action of replevin the jury returned the following verdict: "We, the jury, find the property was replevied in Miami county and at the commencement of this suit the right of and possession thereto was in the plaintiff, and assess his damages at $25." A motion for a *venire de novo* was overruled. The complaint alleged that the defendants had possession of the property without right and unlawfully detained the same from plaintiff and an answer of general denial was filed. *Held*, that the verdict was radically defective, and did not justify the rendition of any judgment. A material part of the issue joined was not passed upon by the verdict. The plaintiff may have had the right to the property and to the possession thereof at the commencement of the action, and it may have been replevied in Miami county, and yet this did not entitle him to judgment against the defendants, either for costs or damages, unless the latter wrongfully detained the property, which is not found by the verdict. If the jury find only part of the issue, judgment can not be entered on the verdict. It is void for the whole, and a *venire de novo* will be awarded. 1 Graham & Wat. on New Trials, 140. The motion should have prevailed. Judgment reversed. Opinion by WORDEN, J. BIDDLE, J., dissented, holding the verdict sufficient.—*Ridenour v. Beekman.*

PROMISSORY NOTE — RATE OF INTEREST AFTER MATURITY.—The action was on a promissory note which bore interest at the rate of ten per cent. The questions were, what rate of interest did the note bear after maturity, and what rate of interest should have been specified in the judgment. SCOTT, J., said: "The appellee promised to pay the appellant so much money with ten per cent. interest on a day certain. He violated his contract and did not pay. The law in force at the time this promise was made provided that for its violation the parties themselves might fix in writing the measure of damages, not however to exceed ten per cent. per annum. In this case the rate did not provide what the rate of interest should be after maturity; the law therefore fixed the rate of interest as a measure of damages at six per cent. per annum after the maturity of the note. The contract being silent as to the interest if the note should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provisions of the contract. 22 How. 127. The case of Kilgore v. Bowers, 5 Blackf. 30, is overruled on this point. The statute bearing directly upon the second question arising in this case provides that all judgments on contracts hereafter rendered shall bear the same rate of interest expressed in the contract upon which such judgment is rendered. This evidently means that a judgment rendered on a contract shall bear the same rate of interest which the contract is bearing at the time it is merged in the judgment; and as it is decided above that the note was bearing only six per cent. interest from its maturity to the time of the rendition of the judgment, it follows that the judgment should only bear six per cent. interest." Affirmed.—*Burns v. Anderson.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, Jan., 1880.]

WRIT OF ERROR— REVIEW OF JUDGMENT — HABEAS CORPUS.—A writ of error does not lie to review a judgment on a writ of *habeas corpus*. The 68th section of the practice act provides that appeals from all

circuit courts and from the Superior Court of Cook County may be taken to the Supreme Court from all final judgments, decrees and orders. An appeal is given by statute, but a writ of error is a common law right. Neither an appeal nor writ of error lies to reverse a judgment, decree or order, unless it is final and conclusive on the parties. Is a judgment on the hearing of a writ of *habeas corpus*, rendered by a judge in vacation, or by the circuit court when in session, of that conclusive character? In 32 Ill. 446, it was held that it was not, and that error would not lie to review it. In some of the States the courts hold that the writ lies, but in a majority it is held that such a judgment can not be so revived. In several, the writ is given by statute, and so by an act of Congress requiring the Supreme Court of the United States to review the decisions of the inferior tribunals rendering such judgments. But the courts of last resort in a large number of the States of the Union hold that a writ of error does not lie to such a judgment, and we think these decisions entitled to the greater weight as they seem to follow the well recognized rule that such a writ only lies to a final determination by the lower court. As to the practice in Great Britain, see 2 Salk. 503, 14 East. 92. See also 5 Gilm. 33; 1 Gilm. 606, 32 Ill. 446. Writ dismissed. Opinion by WALKER, J.—*Ex parte Thompson.*

MECHANIC'S LIEN—PRIOR MORTGAGE—DISTRIBUTION—EQUITIES.—Distribution of proceeds of sale had under a decree in a proceeding for a mechanic's lien as between appellant, a mortgagee, and the lien holders named in the decree. The provision of the statute bearing upon the question is section 17 of the act in relation to liens, Rev. Stats. 1874, p. 667, as follows: "No incumbrance upon land, created before or after of the making of a contract under the provisions of this act, shall operate upon the building erected or materials furnished, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; and upon questions arising between previous incumbrancers and creditors, the previous incumbrance shall be preferred to the extent of the value of the land at the time of the contract, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest." The appellant claimed that to the extent of $3,200, that being the stipulated value of the premises prior to the accruing of the mechanic's liens, her two prior mortgages should have been preferred as against the mechanic's liens, and that she was entitled to receive out of the proceeds of the sale said sum of $3,200. *Held*, that this would be in direct contravention of the provision of the statute that "no incumbrance * * * * shall operate upon the building erected or material furnished until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied." As between the mortgages and the mechanic's lien under the statute, the mortgages were entitled to satisfaction out of the lands, and the other liens out of the building. As the building could not properly be separated from the lots, in order to realize the benefit of the liens, the whole property, land and building together, had to be sold that it might be converted into money and the proceeds divided. The proceeds of the sale represent and stand in the place of the land, and the building, and the parties have the same proportionate interest in the proceeds that they had in the property before it was sold. Taking the whole section together the one having such liens is equally preferred to the extent of the value of the building, that the mortgagee is to the extent of the value of the land; thus as between themselves, giving the mortgagor a paramount lien upon the land, and the mechanic and material man a paramount lien upon the building. See 32 Ill. 220; 15 Id. 489; 26 Id. 372; Id. 329; 48 Id. 681; 54 Id. 151. Decree of the appellate court affirmed. Opinion by SHELDON, J.—*Bradley v. Simpson.*

SUPREME COURT OF KANSAS.

February Term, 1880.

VERDICT—INSTRUCTIONS.—1. The verdict of a jury based upon conflicting oral testimony settles every disputed question of fact. 2. Where a case substantially hinges on the respective personal credibility of the plaintiff and defendant as witnesses, the court may generally say to the jury that if you believe the plaintiff's statement you must find for him, and if the defendant's then for him. 3. A misstatement of the language of a witness by the court in its charge to the jury is no ground for reversal, unless such misstatement is as to a material part of his testimony, and probably misleads the jury. Affirmed. Opinion by BREWER, J. All the justices concurring.—*Bellew v. Ahrburg.*

REPLEVIN—PARTIES—PRACTICE.—1. In an action of replevin brought by a judgment debtor to recover exempt property seized by an officer under an execution where no similar property is owned by the debtor, and no selection or separation necessary to distinguish the exempt from the non-exempt property, no notice to the officer at the time of the levy that it is claimed as exempt and no demand for the return prior to suit against the officer, is necessary. 2. Where two parties are joint owners of personal property they should be united as parties in an action to recover the possession. When such an action is commenced by one alone, the defect of parties must be presented in the trial court by pleading, or where pleadings are unnecessary as in cases appealed from a justice of the peace, by directly and specifically calling the attention of the court thereto, and can not first be raised in this court on error. Wilson v. Fuller, 9 Kas. 189. Affirmed. Opinion by BREWER, J. VALENTINE, J., concurring. HORTON, C.J., not sitting.—*Seip v. Tilghman.*

NEW TRIAL—COSTS—PRACTICE.—1. Where a new trial is sought on the ground of accident, newly discovered evidence or other ground that impliedly concedes that the trial already had was without error and the opposing party without fault, there is propriety in requiring the payment of the costs of that trial, as a condition of granting a new one, but when the new trial is sought and awarded solely on the ground of error on the part of the court or jury or misconduct on the part of the plaintiff, it is rare that any costs should be taxed against the moving party. 2. Plaintiff sued defendant alleging that it was a partner in a company to which plaintiff had hired and for which he had done work. Upon the trial he testified that at the time he did the work he did not understand that defendant was a partner in said company. The testimony showed that it was not in fact a partner. Nevertheless the jury found a verdict against it. Upon its motion, on the ground solely of errors at the trial, the district court ruled that it should be granted a new trial, but only upon payment of all costs in that court. *Held*, error, and that the new trial should have been awarded absolutely and without conditions. Reversed. Opinion by BREWER, J. All the justices concurring.—*N. C. C. M. & S. Co. v. Eakins.*

QUERIES AND ANSWERS.

QUERIES.

19. A judgment debtor (in Illinois) has an execution issued against him. The sheriff demands property and the debtor gives him a schedule. as required by the statute. The property (personal) is appraised and does not exeed in value the amount allowed to the debtor as exempt, and no further proceedings are had under the execution. Among this scheduled property is a horse. The debtor afterwards trades that horse for a wagon and a piece of land, which he cultivates but does not occupy as a homestead. Is the wagon still exempt? And is the land exempt? *

20. Can a non-resident of a State whose property has been levied on by a process from a State Court, upon interposing a claim to said property remove said claim case to the United States Circuit Court under the act of March 3d, 1875? See 16 Wall. 190; 59 Ga. 512. *

ANSWERS.

17. [10 Cent. L. J. 198] In Missouri, and most of the other States, the proceeds of the mortgage will be applied on the notes in the order of their maturity. In other States the proceeds will be applied on the notes *pro rata*. 2 Wash. on Real Prop. (4th ed). 122 *et seq*; 36 Mo. 526; 38 Mo. 320; 45 Mo. 484; 54 Mo. 271.

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17. [10 Cent L. J. 198.] C. has not the right to share *pro-rata* where a mortgage is given to secure several notes made payable at different times, with authority to make sale of the premises upon the non-payment at maturity of any of the notes for the satisfaction of such of them as should then be due; if the mortgagee resorts to equity to foreclose he can only obtain foreclosure for such of the notes as shall have become due, as that is the limit of the power of sale in the mortgage, Smith v. Smith 32 Ill. 198. And a foreclosure in such a case for the part of the debt which was due would of necessity, be a release of the security for the amount not due, Smith v. Smith, 32 Ill., 198. The payee of a note or his assignee is in equity regarded as the purchaser of all the securities attached to it, and may pursue them at his discretion. So may the assignees in succession of separate parts of the same debt, and the payee or his assignee of the first due of several notes secured by mortgage has a priority of claim and can foreclose and sell, and the holders of the other notes can redeem in succession according to priority. Vansant v. Allmon, 23 Ill. 31.

Mobile, Ala. B. B. BOONE.

18. [10 Cent. L. J. 218] It is the undoubted rule of law that a guarantor of a promissory note can only be charged when the case is brought within the precise terms of his contract. No presumptions are to be indulged against him. No liability is implied beyond the undertaking which he chooses to employ words to express. Judged by this rule I think it follows that the guaranty in the case supposed amounts to no more than an undertaking on the part of the guarantor that the note is the genuine note of the maker, and that the latter has no good defense to it. In other words, in guaranteeing that the note is "payable," he does not promise that it is "collectible."

W. I. C.

CURRENT TOPICS.

If the reports which we have read on the subject in the newspapers during the past fortnight be true, the bar of the United States have little reason to be proud of their foremost female member. A few weeks ago, a Mrs. Lockwood, who enjoys the distinction of being the first woman admitted to the bar of the Supreme Federal Court, instituted a suit for seduction against a senator of the United States. The scandal which this caused had scarcely become public when the female whom Mrs. Lockwood represented published a card denying the charge and stating that she had given no authority to the lawyer to commence the suit. Instead of the matter being reduced to a question of fact between the two women as to the authority to bring suit which the one alleged and the other denied, Mrs. Lockwood proceeds to attack the senator and to threaten him with the exposure of his past misdeeds. Every thing that is foul and that is distasteful to the pure mind, every creeping thing and every obscene creature, she promises to uncover to the world because she has been prevented from prosecuting a law suit on account of the compounding of the case by the parties to it. This last seems to be the reason, and the only reason for her actions. One is forced to ask here: If a lawyer is the representative of his client, who does this woman represent in this filthy crusade? Not the other woman, for she has denied the professional relation; if not her, then nobody but her own love of notoriety and nastiness. It is only a short time since the Senate of the United States opened the doors of the highest tribunal of the land for Mrs. Lockwood to practise in. Her return is a torrent of scurrility and abuse which she launches at one of its members. There are many noble and pure minded woman who advocate the cause of female suffrage and their freedom to follow any profession or calling that they may desire. But assuredly the cause of female emancipation has no greater enemy in the country than this Mrs. Lockwood.

Contracts in restraint of trade, says the *Law Times*, have received their latest illustration in the recent case of *Roussillon v. Roussillon*, decided by Mr. Justice Fry. The plaintiffs who were champagne merchants at Epernay, and had a place of business in London, applied for an injunction to restrain the defendant from carrying on a rival trade. The defendant went into the employment of the plaintiffs at Epernay in 1853. He remained there two years, and was afterwards employed by them as a traveller in England and Scotland. In 1869, in return for the kindness bestowed upon him by the plaintiffs, and for the trouble they had taken in his commercial education, he undertook not to represent any other champagne house for two years after leaving their service. He also undertook, if at any time he left the plaintiff's house for any reason whatever, not to establish himself nor to associate himself with any other persons or houses in the champagne trade for ten years. The defendant left the plaintiff's employment in 1877, and the defendant established himself in London as a vendor of Ay champagne. Proceedings were instituted in the Tribunal of Commerce at Epernay by the plaintiffs, who obtained judgment by default. The defendant was thereby restrained from representing any champagne house for two years, and from carrying on the business of champaigne merchants for ten years. The present proceedings were brought to enforce either the contract or the judgment. Two questions were thus raised. Mr. Justice Fry was of the opinion that the rule to be deduced from the authorities was, that the restraint must not

be unreasonable, having regard to the circumstances of the business to be protected. He thought the restraint in this case was not larger than the reasonable protection of the plaintiff's business warranted. Must the contract, then, be partial to one place? Such a rule, in his opinion, could be evaded by exception. There were businesses, considering the facilities of communication, which were very well conducted over the whole country or a larger area, and other businesses which could only be interfered with in a limited area. "In the first case, he went on to say, "a universal restriction would be reasonable; in the second, it would be unreasonable to render the contract void. * * * The supposed rule as to locality would only apply to those cases in which, in my judgment, it ought not to apply; and, therefore, unless there is strong authority to bind me, I should hold that there was no such rule." In the recent case of Collins v. Locke, 41 L. T. R. (N. S.) 292, it appears to have been fully admitted by the privy council that contracts in restraint of trade are against public policy unless the restraint they impose is partial only, and they are made for good consideration and are reasonable. The main consideration, however, appears to be whether the restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void, as being injurious to the interests of the public on the grounds of public policy. In Leather Cloth Company v. Lorsont, L. R. 7 Eq. 355, Vice-Chancellor James stated that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. He explained that the same public policy which enables a man to sell what he has in the best market, enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. Restrictions even indefinite in time have been held valid, as in Bunn v. Guy, 4 East 190, or for a life of the party restrained, as in Hitchcock v. Coker, 6 A. & E. 438. Again, Vice-Chancellor Leach, in Bryson v. Whitehead, 1 S. & S. 74, enforced an agreement by a trader upon selling a secret in his trade to restrain himself for twenty years absolutely from the use of such secret, and intimated that the trader might restrain himself generally. Mr. Justice Fry, relying upon Leather Cloth Company v. Lorsont, and other cases, came to the conclusion that the plaintiffs had established a right to an injunction.

NOTES.

——In the United States Circuit Court at San Francisco on the 22d inst. the California law recently enacted forbidding the employment of Chinese by corporations was declared unconstitutional. The case is to be taken to the Supreme Court of the United States.——In a case decided in New York recently where the trial had been conducted for the plaintiff by a law clerk not admitted to practice, the judgment was declared to be void and set aside accordingly.——Mr. Justice Bradley's opinion on the constitutionality of the Federal election law is too lengthy to publish in full. A long analysis of the opinion taken from the *syllabus* of the case will be found in the present number of this JOURNAL. Their great length has likewise prevented our publishing the dissenting opinions of Mr. Justice Field in the different constitutional cases lately decided in the Supreme Court of the United States.

——The paper on Blood Stains in Criminal Trials contributed by Judge Kelley to our issue of March 5th has attracted much attention. Dr. Wharton, the distinguished law writer, expresses his thanks for the article and asks permission to extract the material parts of it for publication in the forthcoming edition of his work on Criminal Law, which request is readily granted. "The course of experts," says Dr. Wharton, "in swearing to blood stains is an outrage which ought to be checked. I would like to see one of them indicted for perjury in false swearing to a rash opinion which he could have corrected by proper study."

——In the United State Circuit Court in this city last week a member of the bar of that court introduced a member of the Cincinnati bar who was counsel in a patent case about to be argued before the court, and asked that he be enrolled. There was a whispered conference between Judges McCrary and Treat for a moment or two, when the latter said there appeared to be a misunderstanding in relation to the enrollment of attorneys in that court. There was a wide differance in the various Federal courts in regard to the practice in that matter, and this court had found it necessary, years ago, to establish a rule in the matter for its own protection. If an attorney had been enrolled in the district court, he might be enrolled in the circuit court on the motion of some member of its bar. Otherwise, no attorney could be enrolled without a certificate from the board of examiners or a diploma from the St. Louis law school. These diplomas were recognized because the judges of this court were members of the board of examiners of the law school. The gentleman who made the motion explained that it was only for the purpose of the case about to come up that the enrollment had been asked for, merely as an act of courtesy to the gentleman from Cincinnati. Judge Treat said that as an act of courtesy any member of another bar would be permitted to appear in a specified case on being properly introduced, but not to be enrolled as a permanent member of the bar of that court. The gentleman was thereupon allowed to appear in the case.

——The *Law Journal* notices that an example of the way in which the law of evidence sometimes shuts out the best source of information was furnished in the late English case of Morall v. Morall. The question in the cause was, whether the plaintiff was the child of a certain Mrs. Ninon and her former husband, who died in a lunatic asylum the day before the child was born. Mrs. Ninon was asked, "Did you visit your husband at the asylum?" but the question was ruled out by Mr. Justice Manisty, on the ground of public policy. It would seem that the law considers truth less than prudery.——A local newspaper gives the following professional anecdote: They were trying a shooting case down at Savannah the other day, when one of the witnesses said it occurred in front of the hotel. The counsel asked him if he was in the hotel at the time? No. Was he outside? No. The venerable judge, adjusting his spectacles, addressed the witness thus: "How is it possible that you were neither inside nor outside of the hotel, and yet you say that you were present at the shooting? You surely must have been either inside or outside of it—that's certain." The witness, with a twinkle in his eye and a knowing smile about the corners of his mouth, quickly replied: "You see, judge, I was seated on a four-legged stool, two legs of which were inside the door and two legs were resting on the pavement, so that I was neither inside the house nor outside of it." The judge was satisfied.